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Reasons for decision

Port of Saint John Employers Association, Inc.,

applicant,

and

General Longshore Workers, Checkers, and
Shipliners of the Port of Saint John, N.B., Local 273
of the International Longshoremen's Association,

respondent.

Board File: 28961-C
Neutral Citation: 2011 CIRB 609
October 11, 2011

The Board was composed of Ms. Elizabeth MacPherson, Chairperson and Messrs. Daniel Charbonneau and André Lecavalier, Members.

Parties' Representatives on Record

Mr. Michel L. Arseneault, for the Port of Saint John Employers Association, Inc.

Mr. Patrick T. Riley, for the General Longshore Workers, Checkers, and Shipliners of the Port of Saint John, N.B., Local 273 of the International Longshoremen's Association

I—Nature of the Application

[1] On September 21, 2011, the Port of Saint John Employers Association, Inc. (PSJEA or the employer) applied to the Board pursuant to section 91 of the *Canada Labour Code*

(Part I – Industrial Relations) (the Code) for a declaration of unlawful strike and consequent orders against the General Longshore Workers, Checkers, and Shipliners of the Port of Saint John, N.B., Local 273 of the International Longshoremen's Association (ILA 273) and its President, Terry Wilson, its officers, representatives and members (collectively, the respondents).

II–Background

[2] ILA 273 is the certified bargaining agent for three units of employees working in the longshoring industry in the Port of Saint John, New Brunswick. The PSJEA represents the longshore employers in the Port. ILA 273 and the PSJEA are parties to a collective agreement that is in force and effect until December 31, 2014.

[3] ILA 273 also represents the employees of Autoterm Inc. (Autoterm), pursuant to a voluntary recognition arrangement. At the time of the employer's application, ILA 273 and Autoterm were engaged in collective bargaining in relation to this bargaining unit.

[4] The application alleges that ILA 273 and its members will refuse to report for work at the Port of Saint John when the ILA 273 members at Autoterm commence strike action, and will honour the picket line of the Autoterm employees.

[5] The employer's application was anticipatory. As of the date of the application, the Autoterm employees were not in a legal strike position, ILA 273 had not taken a strike vote nor had it given a notice of strike to Autoterm.

III–Positions of the Parties

A–PSJEA

[6] The employer alleges that the union advised it that they intend to participate in an illegal strike by refusing to cross picket lines which are to be set up by ILA 273 members who are employed by Autoterm. The PSJEA anticipates that the union and its members will honour the picket line and

refuse to report for work at the Port of Saint John once the Autoterm employees commence strike action. The employer suggests that ILA 273 has proceeded in a similar fashion in the past. It asks that the Board declare that the union and its President will have declared and authorized an illegal strike if they refuse to cross the ILA 273 picket line at Autoterm and that the ILA 273 members are likely to participate in an illegal strike. It further asks that the Board order the ILA 273 members to continue to perform their work and not participate in any concerted illegal activity, that the union be required to inform its members in writing of the orders issued by the Board and that they be required to demonstrate that they have complied with this order.

[7] The employer states that Autoterm is not and has never been a member of the PSJEA and that its employees are members of a different division of ILA 273, namely ILA Local 273 (Autoterm).

B-ILA 273

[8] ILA 273 takes the position that Autoterm is a member of the PSJEA and part of the geographic certification held by the union. It points to the provisions of its collective agreements with Autoterm and the PSJEA, which provide that members of ILA 273 are not required to cross a legal picket line established by any ILA 273 bargaining unit as a result of a legal strike or lockout. It argues that the PSJEA's application is premature and should be dismissed.

IV-Analysis and Decision

[9] The relevant sections of the *Code* read as follows:

3.(1) "strike" includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output;

...

89.(2) No employee shall participate in a strike unless

- (a) the employee is a member of a bargaining unit in respect of which a notice to bargain collectively has been given under this Part; and
- (b) the requirements of subsection (1) have been met in respect of the bargaining unit of which the employee is a member.

91.(1) Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating **or are likely to participate in a strike**, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful.

(emphasis added)

[10] The Board's jurisprudence with respect to refusals to cross picket lines is clear: the refusal to cross a picket line by employees who are not themselves in a legal strike position constitutes an illegal strike, even if the employees are protected from discipline by virtue of a provision in the collective agreement that is applicable to them: see *British Columbia Terminal Elevator Operators' Association*, 2007 CIRB 384; affirmed by the Board in *British Columbia Terminal Elevator Operators' Association*, 2008 CIRB 428 and by the Federal Court of Appeal in *Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operators' Assn.*, 2009 FCA 201; leave to appeal to the Supreme Court of Canada denied in *Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operations' Association, Saskatchewan Wheat Pool, James Richardson International Limited, United Grain Growers Limited d.b.a. Agricore United, Pacific Elevators Limited and Cascadia Terminal - and - Public Service Alliance of Canada and Canadian Labour Congress*, 2009 CanLII 71475 (SCC).

[11] Although section 91(1) permits an employer to apply to the Board for a declaration in anticipation of activity that would constitute a strike within the meaning of the *Code*, the use of the words "or are likely to participate in a strike" in that section suggests that such applications require the realistic prospect of an imminent strike, not mere speculation that a strike could occur at some time in the future. Otherwise, an employer could bring an application pursuant to section 91(1) at any time. Before the resources of the Board are called into play, there must be some evidence that an unlawful strike is likely to take place in the very near future (see *Canadian National Railways* (1984), 57 di 55 (CLRB no. 479)).

[12] In the instant case, there was no imminent prospect of a strike at the time that the employer filed this application. Negotiations between ILA 273 and Autoterm had not reached an impasse; the parties were still in bargaining with mediation assistance. The union had not taken a strike vote, nor

had it given notice of strike. The mere fact that union officials had advised the PSJEA that its members would respect a picket line is not sufficient justification for a declaration of illegal strike, without some evidence that such activity is likely to occur imminently.

[13] Accordingly, the Board finds that the employer's application was premature and dismisses it on that basis, without prejudice to the PSJEA's right to bring a new application in the proper circumstances.

[14] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Daniel Charbonneau
Member

André Lecavalier
Member